UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

SAINT LUKES MEMORIAL HOSPITAL, INC. [1]/

Employer

and Case 24-RC-8281

UNIDAD LABORAL DE ENFERMERAS (OS)
Y EMPLEADOS DE LA SALUD

Petitioner

ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer is engaged in the operation of an acute care hospital located in Ponce, Puerto Rico, where it employs approximately 200 registered nurses. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit consisting of all registered nurses (RNs) employed by the Employer at its facilities in Ponce, Puerto Rico, excluding all other employees, and all guards, all clinical coordinators of departments, head nurse, managers, and all other supervisors as defined in the Act.

A hearing officer of the Board held hearings on the issues raised by the petition. [2]/ After the hearings, the Employer and the Petitioner filed briefs with me. [3]/ Although it did not address the issue in its briefs, the Employer claimed at the hearing that it is exempt from the Board's jurisdiction because it is owned and controlled by the Episcopal Church of Puerto Rico and is a religious institution under the principles set forth in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and *University of Great Falls v. NLRB*, 278 F 3d. 1335 (D.C. Cir. 2002). In addition, the Employer appears to contend that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. Section 2000 bb-1, would be violated if the Board asserted jurisdiction. Finally, the the Employer, contrary to the Petitioner, contends that because the RNs at the hospital regularly serve in the capacity as the NIC (nurse in charge), they are supervisors within the meaning of Section 2(11) of the Act. In this regard, the Employer asserts that when RNs act as a NIC they exercise Section 2(11) authority by assigning and responsibly directing the work of other

[1]/ The name of the Employer appears as amended at the hearing.

[2]/ On May 23, 2003, the case was remanded for the purpose of adducing additional evidence regarding the issue of the supervisory status of BSN nurses.

[3] / The Employer filed a second brief at the conclusion of the remand hearing in this matter.

employees with the use of independent judgment. On the other hand, the Petitioner argues the limited assignment and direction of work performed by RNs do not involve the exercise of independent judgment.

I have carefully considered the evidence and arguments presented by the parties on the issues. As a threshold matter, I conclude, as explained in detail below, that the Employer is not exempt from the jurisdiction of the Board. Although there is some evidence that RNs rotating into certain NIC position may have some modicum of authority to assign and responsibly direct employees, this does not serve to establish the Employer's contention that the entire group of RNs is comprised of supervisors in the circumstances of this case. To so find would produce the absurd outcome that although on any given day only a few RNs among the large number of employees sought to be represented have any even arguable supervisory authority, the entire group would be considered non-employees due to the Employer's system of rotating them through a marginal supervisory classification. Accordingly, and noting that a unit of all registered nurses is an appropriate unit, [4]/ I have determined to include all the RNs sought in the unit in which I direct an election.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS

As previously stated, the Employer is engaged in the operation of an acute care hospital at Ponce, Puerto Rico, referred to herein as the hospital, where it employs over 200 RNs, along with about 97 LPNs, (licensed practical nurses), 13 operating room technicians and 5 ward clerks in its nursing department. The Employer's nursing department consists of 12 smaller or sub-departments referred to in the record as: (1) Labor and Delivery, (2) Nursery, (3) Pediatrics, (4) Intensive Care Unit (ICU), (5) Surgery, (6) OB-GYN, (7) Medicine, (8) Newborn Intensive Care Unit (NICU) and Pediatric Intensive Care Unit (PICU), (9) Operating Room, (10) Catheter Department, (11) Emergency Room, and (12) the Diabetes Department. The Employer's complement of nursing employees includes a small number of RN generalists. RN generalists are ADN RNs who have 2 years of specialized education, an associates degree and extensive experience who were given BSN RN (4 year degree, bachelor of science) status by way of a "grandfather clause" contained in the Puerto Rico nursing law.

A. Ownership of the Employer:

About November 6, 2000, the Episcopal Health Services (Servicios de Salud Episcopal, Inc.) as the guarantor of an Asset Purchase Agreement purchased the Employer. [5]/ The record discloses that the guarantor is a separate entity, which is wholly owned by the Episcopal Church of Puerto Rico. The hospital was formerly known as the Jose M. Gandara hospital and was

[4]/ 284 NLRB 1579**,** 1597 (1988).

[5]/ It appears that the Employer actually assumed operation of the hospital on about July 1, 2000.

purchased from the Department of Health Government of Puerto Rico. Prior to completion of the Asset Purchase Agreement through Episcopal Health Services, the Employer was incorporated on September 1, 2000, by the Episcopal Church of Puerto Rico, as a non-profit corporation organized under the laws of Puerto Rico.

B. Puerto Rico's Nursing Law:

Puerto Rico's Law 9 of 1987, [6]/ describes four categories of nurses: (1) individuals with a Master's Degree in Nursing; (2) a general female/male nurse with a BSN degree from an accredited institution of higher learning; (3) an ADN nurse; and (4) an LPN. The record indicates that ADN nurses with extensive experience were "grandfathered" by being granted generalist or level 2 nursing status in an amendment to *Law 9*. With regard to the BSN RN, *Law 9* states, in part, that the individual in this position, "directs and supervises the nursing care offered by female and male nurses in the Associate and Practitioners category …" *Law 9* does not define the terms "supervisor" or "supervises." The Employer contends that *Law 9* confers supervisory authority on BSN RNs over the ADN RNs and LPNs. For reasons discussed later in this decision, and based on the entire record, I find that *Law 9* is not dispositive of this issue. [7]/

C. Supervisory Hierarchy - Nursing Department:

Operational Executive Director Ramon Lopez Maldonado is over the Nursing Department. The Nursing Director, Maria Lugo, is in charge of the day-to-day operation of the nursing department; Lugo reports to Maldonado. A supervisor or director who reports to Lugo heads each of the Employer's 12 nursing sub-departments. Additionally, 10 of the 12 sub-departments each have a clinical coordinator who report to and assist their respective department supervisors. With regard to the remaining two departments, Medicine and Nursery, the Medicine department has two clinical coordinators and the Nursery department has a head nurse to assist with supervision rather than a coordinator. The parties stipulated, and the record shows, that the individuals holding these positions are supervisors within the meaning of Section 2(11) of the Act. In addition to these departmental supervisors, there are four full-time general supervisors under Lugo and an additional five per diem general supervisors who perform general supervisor's duties on a part-time basis. The parties also stipulated, and the record shows, that the four full-time general supervisors are supervisors within the meaning of the Act.

Department supervisors and clinical coordinators generally are scheduled to work the day shift from 7 a.m. to 3 p.m., Monday through Friday, although the clinical coordinators sometimes begin and end their shifts 1 hour later than the department supervisors. General supervisors may also be present during these hours, but they are generally assigned to work the night shift from 3 p.m. to 11 p.m. or the morning shift from 11 p.m. to 7 a.m. The department supervisors or their respective clinical coordinators or head nurse are the supervisors who are principally responsible for preparing monthly and daily staffing schedules and work assignment sheets.

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[6]/ *20 Puerto Rico Laws Annotated 203. Law 9.*

[7]/ Moreover, the Employer appears to concede in its brief that *Law 9* is not controlling in determining Section 2(11) status.

Bi-weekly schedules are prepared by the same admitted supervisors for the Emergency Room to accommodate the 12-hour shifts worked by many of the RNs in that department. In the absence of a department supervisor or coordinator, Nursing Director Lugo may delegate the preparation of the monthly, bi-weekly, or daily schedules to a general supervisor. Copies of monthly work assignment schedules for each department are forwarded to Lugo and to the office utilized by the general supervisors.

Department supervisors, and clinical coordinators or the head nurse adjust employee grievances. In this regard, the parties' stipulated that the RNs sought by the Petitioner do not have the authority to adjust the grievances of other employees. Additionally, department supervisors and the clinical coordinators, unlike the RNs sought, are salaried employees who receive compensatory time off rather than overtime pay when they work additional hours.

The four full-time general supervisors employed by the Employer are Edwin Colon, Elsie Castro, Osvaldo Torres, and Nilda Santos. The record reflects that these general supervisors and the five per diem general supervisors are "responsible for the supervision of the nursing care during the morning and night shifts, [have] the authority to act according to his/her own good judgment regarding nursing affairs and [take] on additional functional authority regarding other services during those shifts." The job description and the record reflect that, in exercising their duties, general supervisors, "supervise and control the execution of the employees to assure that they continuously perform the tasks according to the hospital's mission," and "assign the nursing personnel responsible for the patients' care, taking into consideration the level of competence, service need and collective covenant in force." They also "Guide and train the staff over norms, procedures and execution standards required before assigning a task." The record further discloses that general supervisors are responsible for all administrative and functioning areas of the hospital during their shifts.

D. Centralized Personnel Functions:

Many human resource functions, including those involving Section 2(11) criteria, are handled centrally through the Employer's Human Resources department. These functions include hiring, transferring, suspending, laying off, recalling, promoting, discharging, rewarding, and disciplining employees. Juan Salazar, Director of Human Resources, is in charge of the day-to-day operation of this department. Reflective of the centralization of many personnel issues is the stipulation of the parties that the RNs sought to be represented by the Petitioner do not hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline employees. [8]/ Moreover, RNs do not have the authority to adjust grievances or to recommend action with respect to grievance situations involving other employees. Conversely, the department supervisors, clinical coordinators, and head nurse do have such authority.

[8]/ It appears from the record, specifically through statements made by counsel, that the parties also agree that RNs do not have the authority to make effective recommendations with regard to any of these indicia of Section 2(11) status.

E. The Nursing Department:

1. Wages, Benefits, and Working Conditions:

The RNs in dispute, as well as the LPNs, are paid on an hourly basis. The record discloses that most BSN RNs with less than 2 years of experience are paid a base rate of $6.64 an hour, ADNs with similar experience are paid $6.06 an hour, and LPNs with similar experience are paid $5.16 an hour. BSNs in the ICU, NICU, and PICU with similar experience are paid slightly more than other BSNs, earning $7.50 an hour. Nurses with more than 2 years experience receive slightly higher base wages, with the exception that the ICU, NICU, and PICU BSNs continue to receive $7.50 an hour. Other BSNs with 2 or more years of experience are paid $7.21, ADNs are paid $6.64, and LPNs are paid $5.16. The record discloses that some RNs are paid as much as $8.19 an hour. One RN testified that she is paid $7.76 an hour and another testified to receiving $7.21 an hour. A grandfathered generalist nurse testified that she is paid $8.18 an hour. The beginning wage for LPNs is $5.16 an hour. LPNs testified to receiving $5.63 and $5.91 an hour. The parties stipulated and the record reflects that RNs do not receive extra compensation for performing NIC duties.

The Employer's hourly employees punch their time cards four times a day, at the beginning of a shift, before and after lunch, and at the end of the day. Additionally, all hourly employees of the nursing department are paid overtime when they work more than 40 hours a week. The general supervisors, department supervisors and clinical coordinators are classified by the Employer as administrative employees who are paid a salary and receive compensatory time off work in lieu of pay for any overtime hours of work that they perform. All salaried employees receive certain benefits, including paid vacation, holidays, Christmas bonus, sick leave, and health insurance coverage.

Nearly all of the nursing departments operate three shifts, 24 hours a day, 7 days a week. The three principal shifts are the day shift from 7 a.m. to 3 p.m., the night shift from 3 p.m. to 11 p.m., and the morning shift from 11 p.m. to 7 a.m. There are, however, slight variations on these shifts for some personnel. The Emergency Room RNs work both 8 and 12-hour shifts. The day shift is the busiest shift and consequently the largest number of nurses and other personnel are typically assigned to this shift. All nursing personnel, including the RNs, are required to advise members of the nursing staff reporting to work for the next shift about the conditions of the patients under their care and to provide any other information necessary to maintain the continuity of care for those patients. The Employer utilizes per diem nurses in 9 or 10 of its 12 nursing departments. The exceptions being the catheter department and the NICU and PICU department. Per diem RNs receive $75 for each day shift worked, $85 for each night shift worked, and $90 for each morning shift worked.

2. Functions/Responsibilities of RNs Sought by Petitioner:

The record discloses that all of the RNs sought by the Petitioner regularly take turns or rotate performing the duties of the NIC, team leader, lead or charge nurse in each department and on each shift. [9]/ All of the RNs are trained to be "in charge," however some RNs are obviously

[9]/ These terms are used interchangeably throughout the records to designate nurses who are "in charge" in a particular department and on a particular shift.

more experienced than others. Newer RNs ("recruits") are mentored by more experienced RNs. Thus, the frequency with which RNs serve as charge nurses varies from department to department depending on the number of RNs who are employed in a particular department. Specific record testimony reflects that in nearly every nursing department the RNs in each department rotate performing NIC duties, with RNs in some departments performing as a NIC as few as three times a month and RNs in other departments serving in the capacity of NIC as many as ten times each month. I note that RNs in the emergency room department performed NIC duties on the low end when considering the number of shifts on which each nurse performed NIC duties on a monthly basis. However, these are 12-hour shifts (as opposed to the more typical 8-hour shifts) and still involve a significant amount of work time performing such duties.

In regard to the NIC or charge nurse function, several job descriptions for RNs were offered into evidence. Each of these job descriptions lists up to 74 separate functions and responsibilities. Contained among these listed items is a reference to the "supervisory" role of the RNs. Thus, an RN in pediatrics is expected to carry out a leadership role. This role includes: "a. Elaborate work assignment considering the condition. b. Supervise tasks delegated to other personnel. c. Direct efficiently personnel under your supervision." One of the 55 listed functions and responsibilities of an RN in the surgery department is, "To manage and supervise the tasks assigned to the associate and practical nursing staff on their work schedules." [10]/ Emergency Room RNs are expected as one of their 62 listed functions and responsibilities to, "Elaborate the daily work assignment considering the patient's condition and the personnel's skills. Supervise the tasks delegated to other personnel. Direct efficiently personnel assigned to his/her shift." RNs in the medicine department also have included among their functions and responsibilities, "To manage and supervise the tasks assigned to the associate and practical nursing staff on their work schedules." The parties also stipulated that the RNs acting as NIC of the intensive care department, NICU/PICU, and OB/GYN perform their duties, in relevant part, as follows:

> Nurse-in-charge assigns jobs. They move personnel from one side to the other. They are accountable for the shift. They assign patients to other registered nurses. They make changes in work programs. They make changes in work assignments. And they make decisions on their own at their level.

3. Functions/Responsibilities of LPNs**:**

In connection with receiving instructions, the job description for LPNs reflects that they are to, "Plan the tasks to be performed in order of priority, considering the services, needs, and according to the instructions of the nurse in charge." For example, an LPN assigned to the medicine department testified that a NIC assigns him to take vital signs, clean and bathe patients, change their blankets, and to transport patients for patient care functions and for various medical studies.

[10]/ These same roles are stated slightly differently on a competency evaluation for pediatrics RNs that is also in evidence.

The job description for emergency room LPNs includes as responsibilities that LPNs are to document and notify supervision about any changes in patients, measure vital signs and notify the nurse in charge, provide hygiene and security to patients, maintain materials and equipment, collect laboratory samples according to established protocols, and participate in the change of shift report on patient status. Additionally, LPNs are to assist RNs in treating wounds and ulcers applying aseptic techniques, assist with electrocardiogram procedures, special procedures, and minor surgery, process input and output of fluids, and prepare cadavers according to protocol and offer emotional support to families.

4. Labor and Delivery:

The patients in the Labor and Delivery department, as the name suggests, are those who are about to give birth. Edith Fernandez is the Labor and Delivery department supervisor and Nydia Cosme is the department coordinator. Fernandez and Cosme both work from 7 a.m. to 3 p.m., Monday through Friday. The record reflects that there are about 22 to 23 RNs employed in Labor and Delivery. To ensure 24-hour nursing coverage in the department, the RNs assigned to this department work rotating shifts. The day shift is from 7 a.m. to 3 p.m., the night shift from 3 p.m. to 11 p.m., and morning shift from 11 p.m. to 7 a.m. The day shift utilizes the largest complement of RNs; in comparison, the third or night shift utilizes the fewest number of RNs, about three or four. The remaining employees in this department consist of about four LPNs, and one ward clerk. Two of the LPNs work a fixed shift, whereas, the other two LPNs work rotating shifts like the RNs.

All of the RNs in this department, including ADN RNs, rotate through the NIC position. Thus, all of the RNs will regularly perform the duties of a NIC approximately 5 to 10 times a month. NICs in this department take the skill variances and experience of RNs and other nurses into account, as well as patient needs, when making task assignments. However, the record reflects that ultimately all of the RNs in the department have the skill and ability to perform all of the necessary tasks. Finally, NICs in this department have the authority to direct nursing personnel to work in another department when a request for assistance is made.

The clinical coordinator provides daily work assignment sheets. However, NICs in this department can and do make changes to these work assignments. They assign nurses to different patients, reassign their tasks, and change their meal hours. When a NIC reassigns a nurse from duties set forth on the daily work assignment sheet, she makes a written notation of the change on the sheet.

NICs in labor and delivery "take report" at the shift change, assign patients to specific nursing personnel, and determine which nurse will handle the admitting process for which patient. At that point, the oncoming NIC assigns patients to specific nursing personnel taking into consideration the patients' conditions and the expertise of each nurse.

5. Nursery:

The Nursery department is located on the third floor of the hospital and operates 24 hours a day to provide care for newborns. The nursery is divided into three patient areas or units: well

baby, intermediate care, and constant care. Elizabeth Ambert is the department supervisor. Her assistant is Carmen Echevarria. Ambert works 8 a.m. to 4 p.m., Monday through Friday, whereas Echevarria works the same days but arrives and leaves one hour earlier. There are about 10 to 12 RNs and about 6 LPNs employed in this department. All of the RNs in this department are BSN RNs with the exception of three who are grandfathered generalist nurses. This department is normally staffed by three RNs and two LPNs on the day shift, two RNs and two LPNs on the second or evening shift, and two RNs and one LPN on the night shift.

When neither the supervisor nor coordinator is present, the NICs are in charge of this department. An RN in this department will rotate into this NIC position 6 to 7 times a month. The NIC assigns nursing personnel to work in a particular area of the Nursery department based on patient needs. NICs can prioritize work by requiring nursing personnel to cease one task and perform another. For example, the record reflects a NIC can instruct a LPN to take samples to the lab, bring babies to designated departments for X-rays or studies, or to be discharged. A NIC takes into consideration a patient's acuity, the skills of the nurses, and the patient census when moving a nurse from one area of the Nursery to another.

The record reflects that some of the nurses in the Nursery department are able to assess a patient's condition quicker than other department nurses because they have more clinical training. Additionally, the nurses in the department are not equally skilled. For example, the record reflects that some of the nurses are more skilled at channeling (finding a vein) in a very small patient than other nurses.

An RN in the Nursery department testified that while working as a NIC, she regularly changes the nurse assignment for particularly delicate patients. She estimated that she changes patient assignments for nursing personnel about one half of the time that she works as a NIC. Thus, the record reflects that when the department needed an additional RN in the "well baby area" because of the large number of patient admissions and discharges, the NIC transferred an RN to that area from the "constant care" area/unit. In another example reflected in the record, during the night shift a NIC reassigned an LPN from the "constant care" area/unit to the "well baby" area/unit on the night shift because there were no discharges during that shift. As a result, it was not necessary for the Employer to have an RN in the "well baby" care area/unit during that shift.

In the Nursery, NICs have the authority, without prior authorization from admitted supervisory personnel, to send employees home early when the patient census is low. Further, whenever there is a shortage of nursing personnel because of absences or an increase in patient census, a NIC may call employees and request that they report to work early or for a different shift. Finally, RNs in this department, regardless of whether they are serving in a NIC capacity, do not categorize patients.

In the Nursery, as is the case throughout the nursing department, it is sometimes necessary to take an X-ray of a patient or patients or the patients require the services of a respiratory therapist. During weekend and "off" shifts, X-ray technicians working in the Nursery department take their directions from the NIC. For example, whenever it is necessary to X-ray more than one patient, the NIC determines which patient will be X-rayed first. Thus, the record

reflects that a NIC directed an X-ray technician to X-ray a baby who was having difficulty breathing before taking standard X-rays of other babies. NICs make the same type of priority determinations with respect to respiratory therapists who are working in the department. In this regard, the record reflects that a NIC has instructed a respiratory therapist to perform an arterial gases test on a baby having trouble breathing before performing respiratory therapy on babies who were not similarly distressed. In contrast, however, on the Monday through Friday day shift, the X-ray technicians and respiratory therapists take their directions from the department coordinator.

6. Pediatrics:

The Pediatric department is located on the third floor of the hospital. It is divided into two sides. One side contains about 13 semi-private and isolation rooms and there are about 12 rooms on the other side of the department, with an office in the middle. The personnel in this department consists of about 10 to 12 RNs, at least some of whom are apparently ADNs, about 8 LPNs, and a ward clerk.

Pediatrics operates 24 hours a day, 7 days a week. The nursing personnel in this department work the same three 8 hour shifts as other nursing personnel. Dalila Velez is the supervisor of the Pediatrics department and Maria Hernandez is the clinical coordinator for the department. Velez works Monday through Friday from 8 a.m. to 4 p.m. and Hernandez works the same days of the week but begins and finishes her shift an hour earlier.

The RNs in Pediatrics take turns performing NIC duties on a rotational basis. The record reflects that each RN assumes the role of the NIC about 10 times a month. During the third shift, the NIC categorizes the care for patients. In addition, the NICs, primarily those on the "off" shifts, have authority to change work assignments for nursing personnel. The NICs make changes in nursing assignments based on the nurse's skills and experience. For example, the record reflects that NICs have substituted a more experienced nurse for another to treat a diabetic patient, to assist a patient that was having difficulty breathing, to perform a cauterization, to perform a blood transfusion. The NICs also make nursing assignments based on patient census and acuity levels. The record shows that at least one NIC had recently made work assignment changes on the average of four times a shift. NICs do not routinely change the written assignment sheets when they make these changes. In contrast, the department supervisor or coordinator typically change the Monday - Friday day shift work assignments.

NICs also regularly change meal assignments for other nursing personnel on their shift. For example, the record reflects that a NIC told a nurse who was about to take her meal break to delay the break and attend to a patient who had just arrived from the operating room. The nurse was instructed to take the patient's vital signs.

As is the case with other nursing departments, X-ray technicians and respiratory therapists accept direction from NICs when the NIC on duty establishes a patient priority for receiving the needed services. For example, NICs will instruct these technicians and therapists to cease routine therapy or services and to perform X-ray or respiratory services for patients with more urgent needs.

7. Intensive Care Unit (ICU):

The ICU department operates 24 hours a day, and the RNs work rotating 8-hour shifts. Benigna de Jesus, the supervisor of this department, and Marisol Rivera, the clinical coordinator for the department, work Monday through Friday from 7 a.m. to 3 p.m. The patients in this department are generally adult patients in critical condition with health issues such as coronary problems, acute respiratory problems and cancer. There are two separate areas within the ICU: multidisciplinary and coronary, also referred to in the record as sides "A and B." There are about 29 to 36 RNs, 1 LPN, who works as an escort, and one ward clerk employed in this department.

NIC duties are rotated among all of the RNs in the ICU and each RN in the department is scheduled to work as a NIC about 5 to 6 times a month. Both of the areas in the ICU have a NIC at any given time. NICs can move nursing personnel between these two areas and can make work assignments within each area. The NIC is not required to consult with admitted supervisors when making such assignments. When making patient and area assignments, the NIC takes into account the experience of the nurses and the acuity of the patients. A nurse who has more patients that are acute is typically responsible for fewer overall patients than a nurse whose patients are less acute. In this regard, NICs in the department try to balance patient assignments among the nurses to make the workload equitable. Once again, NICs in this department are not required to consult with admitted supervisors when they make such assignments.

NICs in the ICU are authorized to make changes in the daily assignment sheets to reflect changes that they make. Such changes occur when schedule changes are necessitated by the need to adjust meal periods to accommodate patient needs, the need to reassign tasks in conformity with the skills of the personnel available, and the need to adjust patient coverage when there are unexpected staff absences. These changes can be made without consulting or obtaining authorization from an admitted supervisor. During hours in which the department supervisor and coordinator are not present, NICs in the ICU make requests for additional nursing personnel to a general supervisor.

Many of the patients in the ICU are category 6 or 5 patients, the two most acute classifications of patients. NICs in the ICU assign the less critical patients to newer and less experienced nurses and they assign the more critical patients, category 6, to the more experienced nurses. NICs in the ICU assign nursing personnel on each shift the responsibility to respond to a "Code Green," the type of code that is used to signify that a patient has gone into cardiac arrest. The NIC is responsible for the handling of a "Code Green" during the first minutes until admitted supervisors and/or physicians are able to respond to the code.

8. Surgery:

The Surgery department operates 24 hours a day, 7 days a week, and the nursing personnel work the same 8-hour shifts as described above. Anna Irma Rivera-Aponte is the supervisor of the Surgery department and Maribel Rivera is the clinical coordinator. Aponte works Monday

through Friday from 8 a.m. to 4 p.m. and Rivera works a similar shift, but she reports and leaves an hour earlier each day. There are about 15 RNs, 14 to 15 LPNs, and a ward clerk who work in this first floor department. Of the RNs in this department, all but one is a BSN. The other RN is an ADN nurse. In addition, some per diem RNs work in this department.

All of the RNs in this department rotate into the NIC position, including the per diem nurses. The record shows that as a result of this rotation an RN serves as NIC about 5 or 6 times a month. The oncoming NIC receives a report from the NIC going off shift. The NICs in this department can request personnel to report to work earlier to fill vacancies, make oral changes to task assignments, meal periods, and schedules of nursing personnel working in the department, including LPNs, respiratory therapists, and X-ray technicians. With regard to X-rays, the NIC determines the priority for X-raying patients. The same type of prioritization by the NIC occurs with respiratory therapists and those technicians performing EKGs. Finally, the NIC on duty is in charge of the cardiac arrest team.

NICs place patients in surgery rooms based on their medical conditions. In this regard, the NIC places the more critical patients in rooms located closer to the nurses' station. The exception to this policy is that four of the rooms in the middle of the department are private rooms.

The Surgery department has an established system for ensuring the continuity of care. Thus, if the department appears to be short of personnel, the NIC on duty when the coordinator and department supervisor are not present can request a nurse designated with "R" to remain and work another shift. If the nurse so designated to be the relief nurse refuses to stay for another shift, then the NIC is to contact the General Supervisor in an attempt to resolve this situation. The General Supervisor can require that the "R" designated nurse remain for another shift. When a nurse works beyond her regular shift, the department supervisor is informed by the NIC of this fact and the reason that is was necessary. The department supervisor must approve the pay request for overtime hours.

9. <u>OB-GYN</u>:

The OB-GYN department operates 24-hours a day and both the RNs and LPNs work rotating 8-hour shifts. It is divided into two wings, A and B, with about 22 rooms.

Sol Torres is the supervisor of OB-GYN and Madeline Algarin is the clinical coordinator. Generally, the patients in this department have gynecological conditions or are pre and post-cesarean patients. There are about 11 to 14 RNs employed in this department and about 8 LPNs. The RNs include about three or four BSNs, three are ADNs, and about six are generalist nurses. All of the RNs in this department rotate into the NIC position.

Each RN typically performs as an NIC 6 to 8 times each month. NICs in this department evaluate patients, assign personnel to specific tasks, and make patient assignments. The NIC prioritizes among patients the services provided by out of department technicians, such as respiratory therapy technicians and X-ray technicians. The NIC does not have to consult with an

admitted supervisor before making these prioritizations. Other department nurses also evaluate patient conditions, but the NIC processes the paperwork associated with these evaluations.

The NIC may instruct personnel in this department, including other RNs, to cease performing one task and to perform another. For example, the record demonstrates that NICs have instructed nurses to move from one wing of the department to the other when a patient is in need of immediate prenatal care. Further, the NICs in this department match nurses to patients based on the experience level of each nurse, the patient's condition, and the nurse's knowledge about a particular condition. In this regard, patient acuity is taken into account and the more acute patients are assigned to the more experienced and skilled nurses. A nurse's patient load is balanced by assigning fewer patients to a nurse handling patients with higher acuity levels.

NICs transport patients from the OB/GYN to other departments when emergencies develop. For example, when an expectant patient develops generalized edema or other conditions harmful to the mother or fetus and the patient must be transferred promptly to delivery. The NIC may assign a nurse in her department to provide interim care until a physician arrives.

NICs in the OB/GYN department categorize patients and are involved in preparing the daily work assignment sheet. This sheet reflects the duties and patient assignments for personnel working under the NIC on her particular shift. The NIC changes these duties as patient needs develop. She may consult with the department or general supervisor when making such changes, but not necessarily. Among the assignments made by the NIC is the assignment of RNs to respond to the emergency code, "Code Green" be responsible for medicine carts and cardiac arrest carts. The NIC also assigns personnel to process patient admissions.

During the off shifts in OB/GYN, the NIC determines whether there is a need for additional personnel. She is not required to obtain approval from the department supervisor to make this determination or to call in the needed personnel.

RNs serving as NICs in the OB/GYN department have many nursing duties to perform themselves and spend much of their time during their shift in performing these duties. These duties include consulting with patients' doctors, assigning treatments and procedures to patients, making rounds, educating patients and their families, taking blood samples, blood transfusions, taking a turn in performing patient admissions, and passing on patient census information to the NIC on the incoming shift.

10. Medicine:

The Medicine department operates 24-hours a day on the same rotating shift schedule as previously described. Sulma Camacho is the department supervisor; Margarita Rodriguez, Marta Negron, Ruth Rosado, and Mr. Oquendo are the clinical coordinators. The department is located on the first floor of the hospital and is divided into two sections, Medicine A and Medicine B. Generally, the patients in this 70-bed department have been diagnosed with various illnesses or conditions, including diabetes, high blood pressure, bronchitis, pneumonia, and other pulmonary conditions. There are 34 beds on A section and 36 beds on B section.

There are about 16 to 19 RNs employed primarily in Medicine A section and about 13 to 15 RNs employed primarily in the Medicine B section. About 12 to 13 LPNs are employed in Medicine A section and about 12 to 14 LPNs are employed in Medicine B. Each section has a ward clerk. The Monday through Friday day shift is staffed with two coordinators, one over each section and there is one coordinator for the entire department on the remaining shifts with the exception of the 11 p.m. to 7 a.m. shift. There is never a coordinator on 11 p.m. to 7 a.m. shift. There is a NIC for A section and one for B section on each shift. A majority of the RNs in this department rotate through all three shifts.

Once again, all of the RNs in the Medicine department rotate through the NIC position. In this regard, the record shows that RNs are assigned as a NIC about 3 to 5 times each month. NICs in this department assign tasks to other nursing personnel and can change their assignments. Specifically, NICs can move nursing personnel from one area to another, change the lunch or meal, schedule patient and task assignments for nursing personnel, and tell nursing personnel to suspend or terminate one task and to perform another. The record reflects that such changes are frequent and include a NIC telling an LPN to suspend the taking of vital signs to bring a patient to the X-ray department or to take urgent samples to the lab for testing, and suspending the feeding of a patient to feed a diabetic patient whose meal schedule is sensitive because of his/her medical condition.

NICs in the Medicine department make nursing personnel assignments based on matching nurses with the greatest expertise and capability for handling certain tasks to patients with those needs. NICs in this department interact with respiratory therapists, X-ray technicians, and EKG technicians when they are called to the department to perform their services. The NIC directs these technicians to respond first to those patients whom she determines require the highest priority.

NICs move personnel from the Medicine A section to the Medicine B section and vice-versa, taking into account personnel absences, the number of patients on each section, and the conditions of the patients. NICs regularly inform the department coordinators of the changes after they make such changes. If a NIC is unable to temporarily transfer personnel between the Medicine A section and the Medicine B section, she will seek the assistance of a coordinator to obtain the necessary personnel.

The Medicine coordinators typically assign nursing personnel to the cardiac arrest carts and the medicine carts. However, NICs may change these assignments during the course of a shift. All of the RNs in this department have the skills to operate cardiac arrest carts. The coordinator and the NIC also categorize patients on each shift. The NICs sometimes change patient categorizations during the middle of a shift as acuity levels change. Their determinations in this regard are not reviewed. NICs assign the lower category (less severe conditions) patients to "young graduate" nurses.

11. Newborn Intensive Care Unit (NICU) and Pediatric Intensive Care Unit (PICU) Department:

Evelyn Martinez is the NICU and PICU department supervisor and Adela Quinones is the department clinical coordinator. Quinones and Martinez both have private offices. Martinez works Monday through Friday from 7 a.m. to 3 p.m. and Quinones works the same schedule but arrives and departs one half hour earlier. There are about 24 or 25 RNs employed in this department and one LPN who works as an escort. All of the RNs are BSNs except for one nurse who is an ADN. The department is located on the third floor of the hospital and operates 24 hours a day. There are 13 beds in the NICU and 6 beds in the PICU. Patients in the PICU are juveniles from ages 1 to 18. The patients in this combined department are generally in critical condition. None of them are considered the less critical category 1 or 2 patients. RNs work on all three of the primary 8-hour shifts and some also work 12-hour shifts.

Generally, there is one NIC on each shift covering both NICU and the PICU, but occasionally there will be a NIC over both units on the same shift. Once again, all of the RNs rotate through the NIC classification. Each RN performs these duties 3 to 5 times a month. The NICs evaluate the patient area, categorize patients, and divide those patients amongst the nursing staff in the department taking into consideration each nurse's experience, knowledge, and skills. Quinones generally performs the patient categorizations Monday through Friday. RNs assigned as NIC fill in for Quinones when she is absent or on vacation.

NICs in this department assign personnel between the NICU and the PICU. The most skilled and experienced nurses are assigned by the NICs to small trauma patients. NICs assign discrete tasks and may direct nursing personnel to suspend a particular duty or task and to work on another. For example, the record reflects that a NIC may instruct nursing personnel to cease performing charting or other paperwork and to distribute medication to patients. NICs do not have to obtain prior approval from a supervisor before moving personnel from one area to another, distributing admissions duties, assigning patients to nursing personnel, assigning tasks, or directing personnel to change tasks.

As occurs in the other nursing departments, the NICs in this department regularly deal with technicians who enter the department to provide services to patients or to the machines that are utilized for the patients. Thus, NICs prioritize assignments for respiratory therapists and for X-ray and biomedical technicians.

During the second and third shifts, NICs have the authority to call in needed department personnel without obtaining prior approval. NICs can request these personnel to report to work, but they cannot mandate that they report. Employees called in by NICs can and do receive applicable overtime pay if they report to work. The record reflects that an RN who regularly serves as NIC in this department has called in employees to work in the department about 2 times a month while serving in a NIC capacity.

There is one cardiac arrest cart located in the PICU and another located in the NICU. The department supervisor and coordinator assign personnel to be responsible for these carts. However, the NIC can change the assignment if the assigned nurse is absent. The NIC also

changes the assignment regarding which nurse is responsible for the narcotics key. Narcotics must be kept locked up at all times and their distribution closely monitored.

12. Operating Room:

The supervisor in charge of the Operating Room department is Alicia Quiones. Elizabeth Melendez is the clinical coordinator for the department. The department is located on the second floor of the hospital. There are three principal work areas in this department: pre-anesthesia, recovery, ambulatory surgery, and the operating rooms. There are ten operating rooms in this department, with four on each side of the department and two others that are separated from the other eight.

There are about 21 BSN RNs employed in the Operating Room department, 1 ADN, and about 9 to 15 LPNs. Additionally, there are approximately 9 to 13 operating room technicians. The operating room is staffed 24 hours a day and employees work on the same three shifts as previously described. Some of the employees in this department work fixed shifts and others rotate between the three shifts. NICs in this department also work weekends whereas department supervisors work Monday through Friday from 8 a.m. to 4 p.m. The number of personnel working under the NIC on the second and third shifts and on weekends is much smaller than the number of personnel who typically work the Monday through Friday day shift.

Operating Room NICs make patient assignments, assign personnel from one room to another, and change the lunch hours of other operating room personnel as needed. In this regard, NICs in this department complete work assignment sheets when the department supervisor or coordinator is not working on the shift. NICs may also stop elective procedures and direct that emergency procedures, including those performed on bullet and stab wounds, be performed instead. This type of situation occurs about 3 or 4 times a month. NICs in the operating room also determine the priority that will be given to the emergency procedures that must be performed.

The Operating Room NIC for all shifts assigns personnel to each operating room with the exception of the Monday through Friday day shift, which is assigned by the department supervisor. Most surgeries are performed during the Monday through Friday day shift. About 35 to 40 surgical procedures are performed on a daily basis. The NIC assigns to the operating rooms teams of personnel consisting of BSN nurses, ADN nurses, practical nurses, and operating room technicians. Each operating room typically is staffed with one BSN, one LPN and a technician (sometimes a second technician is substituted for an LPN), although this may vary depending on the case. In this regard, the NIC is authorized to exchange personnel from one operating room to another and does so to fulfill the needs of each operation. The NIC moves nurses and technicians from one operating room to another based on his or her experience and the type of emergency. Operating Room NICs also assign maintenance personnel to clean each operating room and then check the work to ensure that it is satisfactory. During afternoon, evening, and weekend shifts, Operating Room NICs are also responsible for arranging and prioritizing X-ray and sonogram technicians and their services. These technicians report to the operating room on loan from their respective departments and perform tasks on the “off shifts” under the direction of the NIC.

Operating Room NICs can require personnel to cease tasks on which they are working and to perform other tasks. For example, the record reflects that a NIC may instruct an employee to cease a task and deliver a sample for testing purposes before resuming the prior task. NICs also adjust meal periods to accommodate patient needs.

NIC duties are rotated among the RNs in the Operating Room with each RN serving in the capacity of NIC about 6 to 8 times a month. With the exception of the Monday through Friday day shift, the NIC determines whether additional personnel are needed to staff each shift. In this regard, the NIC may request employees to report early or to work overtime if needed. The NIC makes the request for additional personnel from among those who are available to work the shift. The NIC is not required to seek approval from the department supervisor to make these types of staffing adjustments, but may do so in any event. In practice, the department supervisor typically designates those employees who are to stay past the end of the shift. Although the NIC can request employees to work overtime, she must verbally notify an admitted supervisor or she must do so in writing if the supervisor is not present.

The NIC may turn to the general supervisor for assistance in finding replacement personnel. The NIC cannot order an employee to report to work. However, the department supervisor can do so. If there are employee misconduct issues on a shift, the NIC attempts to resolve the issue. If unable to do so, the NIC refers the matter to a general supervisor or department supervisor. NICs do not recommend disciplinary action.

13. Catheter Department**:**

Gabriel Ortiz is the supervisor of this department. A clinical coordinator assists her. The department operates from 7 a.m. to 3 p.m., Monday through Friday. There are about two RNs employed in this department. No LPNs or technicians are employed in the department. There is no evidence available with respect to the duties of the RNs in the Catheter department.

14. Emergency Room:

Alziza Mamout is the supervisor in charge of the Emergency Room. The Clinical Coordinator, Rosa Ortiz, assists her. The Emergency Room is located on the ground floor of the hospital and operates 24 hours a day. There are about 30 to 39 RNs and 6 LPNs employed in the Emergency Room. Unlike most of the nursing staff, the Emergency Room RNs work both 12-hour shifts and 8-hour shifts, but nurses assigned to NIC duties are those who are scheduled on 12-hour shifts. The LPNs in that department, however, work only the more typical 8-hour shifts. Mamout and Ortiz work Monday through Friday from 7 a.m. to 3 p.m.

The Emergency Room is subdivided into several different patient care areas. These areas include: triage pediatrics, observation pediatrics, triage adult, trauma area, and ambulatory treatment area. In triage pediatrics, pediatrics patients have their vital signs taken and are assessed by a pediatrician. In observation pediatrics patients are observed and either treated and released or hospitalized. In triage adult, like triage pediatrics, adult patients have their vital signs taken, are evaluated by a physician, and are treated. An injury requiring immediate intervention

is treated in the trauma area whereas injuries or illnesses of a less immediate nature are treated in the ambulatory treatment area. Each area contains several stretchers that are used for evaluating and assessing cardiac patients, isolating patients with potentially contagious illnesses, the performance of minor surgeries, and the evaluation and treatment of gynecological patients. Typically, one or two RNs are assigned to each area within the Emergency Room and another is assigned to be in charge of narcotics on each shift. The nurse assigned to perform lead or charge functions on a particular shift in the Emergency Room is typically, but not always, assigned to work in a specific area or subdivision of the Emergency Room and is responsible for patient care in that area.

RNs in the Emergency Room all perform NIC duties on a rotating basis. These RNs serve in a NIC capacity about 3 to 5 times a month, but on occasion less frequently, while also having patients assigned to them. The record discloses that NICs in the Emergency Room assign nursing personnel to each area based on the personnel's experience, skill or capacity to perform particular types of duties. NICs in this department move nursing personnel between the areas within the department and instruct employees to move from one task to another task.

Admitted supervisors typically fill out daily work assignment sheets. However, NICs in the Emergency Room occasionally complete entire assignment sheets, are authorized to and regularly make changes to daily work assignment sheets without seeking prior approval from admitted supervisors. Emergency Room NICs usually only make such changes when personnel are unexpectedly absent. When additional nursing personnel are needed, Emergency Room NICs request such personnel from admitted supervisors. When NICs make changes in the department, recent graduate nurses are typically assigned to less complex categories of patients. Emergency room NICs also make changes in meal periods for nursing personnel for accommodating patient needs.

15. Diabetes Department**:**

Patients in the Diabetes department consist primarily of recently diagnosed diabetics age 2 through adult, including elderly patients. Additionally, patients with comprised renal conditions are admitted to this department. Celia Rosas is the department supervisor and the department coordinator is Elizabeth Cintron. Rosas and Cintron both work Monday through Friday from 7 a.m. to 3 p.m. There are about 8 or 9 RNs and about 5 or 6 LPNs in the department. At least 4 of the RNs are ADN RNs. This department has the capacity to care for 30 patients at a given time. This department operates on 12-hour shifts, 7 days a week, from 7 a.m. to 7 p.m. and from 7 p.m. to 7 a.m. The patient census in this department has ranged from as many as 22 or 23 patients to as few as 5.

Apparently, RNs in this department rotate through NIC duties, as is the case in all other nursing departments, and they assign patients to other nursing personnel on the shift while serving in a NIC capacity. Patients are assigned to nurses on the shift based on the category or serious nature of the patient's condition and the skills and abilities of the nursing personnel on duty. Additionally, the NIC adjusts the meal breaks as necessary for the nurses working under them on a particular shift.

When making task assignments in this department, the NIC may opt to change personnel performing particular tasks based on the nurse's relative skills and abilities in performing the task in question. For example, the record shows that a NIC switched the duties of two nurses to make sure that the nurse with superior ability to channel veins performed that work. This is something that she has done from time to time while serving as a NIC. On another occasion, the NIC instructed an LPN to cease performing cleaning duties and escort a patient who was checking out to his car. On yet another occasion, the NIC instructed another BSN RN to cease performing direct patient care tasks and perform blood transfusions.

NICs in this department do not typically complete work assignment sheets. However, on at least some occasions, they do complete such sheets, thereby assigning specific tasks to nursing personnel on a shift. In this regard, an RN testified that she had completed work assignment sheets on two separate occasions, covering two consecutive shifts.

As is the case in other departments, NICs in the Diabetes department call on respiratory therapy technicians as needed. In fact, they often do so before calling a physician to handle emergencies. The NICs prioritize respiratory therapy and X-rays among those patients for whom these services are ordered and they instruct the therapists accordingly. X-ray and respiratory therapy services are performed at least a couple of times each shift. NICs also call maintenance and janitorial personnel to perform needed services within the department.

II. THE JURISDICTIONAL ISSUE

As a threshold matter, I must consider whether it is appropriate for the Board to exercise jurisdiction over the Employer. In *Ukiah Adventist Hospital d/b/a Ukiah Valley Medical Center*, 332 NLRB 602 (2000), the Board considered and rejected arguments similar to those advanced here by the Employer. *Ukiah* involved a representation petition filed by the California Nurses Association seeking to represent a unit of RNs at an acute care hospital operated and managed by the Seventh Day Adventist Church. The Board concluded that asserting jurisdiction over *Ukiah* operations did not conflict with the RFRA.

The RFRA defines "the exercise of religion" as "the exercise of religion under the First Amendment." Thus, under the RFRA an employer must show: (1) that the proposed governmental action will substantially burden a tenet or belief that is central to a religious doctrine held by it, and (2) that the substantially burdened religious belief must be sincerely held. The Board assumed in *Ukiah* for purposes of its decision that asserting jurisdiction over the employer created a substantial burden on the employer's free exercise of religion within the meaning of the RFRA. [11]/ Once that assumption is made, the inquiry shifts to deciding whether assertion of the Board's jurisdiction is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The Board found in *Ukiah* that the application of the Act was not precluded by the RFRA and that the government has a compelling

[11]/ The record in *Ukiah* reflected that the teaching of the Adventist faith prohibits Adventist institutions from recognizing and bargaining with unions. Additionally, the Adventist church prohibits its members from participating in, paying dues to, or operating with the presence of, labor organizations. There is no evidence in the present record of any similar restrictions that form a tenet or tenets of the Episcopalian faith.

interest in preventing labor strife and in protecting the rights of employees to organize and bargain collectively with their employers regarding terms and conditions of employment. Thus, even assuming that it could be established that the assertion of jurisdiction created a substantial burden on the Employer's free exercise of religion within the meaning of the RFRA, the Employer cannot overcome the government's compelling interest in asserting jurisdiction to ensure the right of employees to self organization, to promote industrial peace and to avoid disruptions to the delivery of vital health care services through the practice and procedure of collective bargaining. Moreover, the assumption here that the assertion of jurisdiction would create a substantial burden on the free exercise of religion requires a much greater leap than required in *Ukiah* as there is no evidence that any tenet of the Episcopalian faith would be even slightly infringed upon by asserting jurisdiction. In this regard, there is no evidence that staff or patients are required to be adherents of the Episcopalian faith or that any of its charitable purposes would be adversely affected by the assertion of jurisdiction.

In *Ukiah*, the Board agreed with the regional director that application of the Act to the institution was the least restrictive means of accomplishing these goals. To the extent that the application of the decision in *University of Great Falls*, supra, would suggest a different result with respect to the RFRA in a setting involving a church-operated school, I note that the Court, in that matter, did not indicate, in any way, that its decision should be extended or is applicable to health care institutions. Moreover, I note that I am bound to follow Board law, which I believe to be clear on this point. Accordingly, based on the above and the record as a whole, I find that it is appropriate to assert jurisdiction over the Employer.

III. THE SUPERVISORY ISSUE

A. Overview of legal precedent:

Section 2(11) of the Act defines the term supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp.*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co*., 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 949 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the RNs possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Id.* at 1689; *George C. Foss Co.*, 270 NLRB 232, 234 (1984). Such "minor supervisory duties" are not to deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co*., 416 NLRB 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NRLB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

The burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I observe that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact "to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact's existence." *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, "[w]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that the supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

In reaching my conclusion, I note that RNs are considered by the Board to constitute professional employees. See, e.g., *Yukon Kuskokwim Health Corp*., 328 NLRB 761, 765 (1999). The Board has recognized the tension between the "professional judgment" that is required of a professional employee covered by the Act pursuant to Section 2(12) and the "independent judgment" that excludes an employee from coverage by virtue of Section 2(11). Prior to *Kentucky River*, the Board endeavored to resolve this tension in cases involving the supervisory status of professional employees by holding that the use of professional judgment to direct

employees was not "independent judgment." However, in *Kentucky River*, the Supreme Court held that the Board should not exclude from the "independent judgment" required in Section 2(11) professional or technical judgment when used in directing less-skilled employees to deliver services. The Court reasoned that such a per se approach was inconsistent with the language of Section 2(11) and its previous decision in *NLRB v. Health Care and Retirement Corp.*, 511 U.S. 571 (1994), in which it found that the statute applies no differently to professionals than to other employees.

Although in *Kentucky River*, the Court found the Board's interpretation of "independent judgment" to be inconsistent with the Act, the Court recognized that it is within the Board's discretion to determine what scope or degree of discretion meets the statutory requirement that an individual is utilizing independent judgment in performing his/her duties. The Court stated: "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act." Id., citing *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949). The Court also agreed with the Board that if an employer limits the degree of independent judgment by, for example, detailed orders, the individual may not be appropriately held a supervisor. *Kentucky River*, 532 U.S. at 1867, citing *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Additionally, while the Court explicitly refrained from interpreting the phrase "responsibly to direct," it suggested that the Board could interpret this phrase by "distinguishing between employees who direct the manner of others' performance of discrete tasks from employees who direct other employees as [Section] 2(11) requires." *Kentucky River*, 532 U.S. at 1871, citing *Providence Hospital*, 320 NLRB at 729.

B. The Employer's position:

The Employer contends that all of its RNs, who rotate through the position of NIC, are statutory supervisors based on a number of factors. Thus, the Employer asserts that RNs serve as charge nurses on all shifts and that they engage in responsible direction and assignment of work of other RNs and LPNs, may adjust their work schedules and match patients to nurses based on an evaluation of the patient's condition and the nurse's abilities even when there are departmental supervisory personnel present. The Employer also notes that on two of three shifts the NIC in a department is ordinarily the highest-ranking authority at the department level, and that during these times they determine staffing needs and request additional personnel. The Employer supports its contention of supervisory status, in part, on its assertion that RNs can file reports regarding nurse misconduct; this assertion being made despite the fact that the parties entered into a stipulation that none of the RNs sought have the authority to discipline employees and the record does not disclose the effect that is given to such reports. In addition, the Employer maintains that RNs may challenge doctors' medical orders and have job descriptions and evaluations that reference their "supervisory" duties.

In addition, as noted previously, the Employer contends that the supervisory authority vested in BSN RNs by *Law 9* should at least be a factor considered in reaching a determination on the supervisory status of the BSN RNs, if not of the ADN RNs. Finally, the Employer requests that I take administrative notice of the Decision and Direction of Election in *M. Pavia Fernandez, Inc., d/b/a Pavia Hospital*, Case 26-RC-8289 (formerly 24-RC-8198), a case it asserts is similar to the instant matter.

C. Consideration of issues raised by the Employer:

1. Precedential value of *M. Pavia Fernandez, Inc., d/b/a Pavia Hospital*, Case 26-RC-8289 (formerly 24-RC-8198):

With respect to the Employer's assertion that this case is similar to the Decision and Direction of Election in *M. Pavia Fernandez, Inc., d/b/a Pavia Hospital*, Case 26-RC-8289 (formerly 24-RC-8198), I note that a request for review was granted in *M. Pavia Fernandez, Inc.* and that it is still pending before the Board. I am bound to follow Board law. Since no final adjudication has been made in *M. Pavia Fernandez, Inc*., it has no precedential application in this case. In any event, there is insufficient information in the body of that decision to permit an accurate comparison of the two cases.

2. Applicability of Puerto Rico's *Law 9*:

With regard to the purported applicability of Puerto Rico's *Law 9* to determinations of supervisory status under the Act, I note that in *Crittenton Hospital*, 328 NLRB 879 (1999), the Board was confronted with a similar argument. The employer in *Crittenton* claimed that the Michigan Health Care statute conclusively demonstrated the Section 2(11) supervisory status of its' RNs. Id. The statute relied upon in that matter controlled the scope of practice for RNs in the State of Michigan and, like *Law 9*, required the RNs to supervise employees with lesser skills. In rejecting the applicability of the Michigan statute, the Board noted and found that, "… nurse practice laws relate to RNs' professional obligations and have nothing to do with the purpose of the Section 2(11) supervisory exclusion, with its definitional language, or with the Board's application of the provision. Those laws do not purport to in any way track the NLRA's definition of a supervisor. We will not substitute the wording of the nurse practice acts for the Congressionally mandated requirements for supervisory status in the NLRA." Id. Accordingly, I reject the Employer's arguments here regarding the applicability of *Law 9*.

3. RNs' job descriptions:

With regard to the Employer's contentions that job descriptions and evaluations for BSN RNs make reference to the performance of "supervisory" duties, it is well settled that it is the duties that are actually performed that determine supervisory status, not the issuance of "paper authority" that is not exercised. See, *Crittenton Hospital*, 328 NLRB at 879.

4. Challenging of doctors' orders:

As an example of independent judgment exercised by RNs, the Employer points to the fact that they may question a physician's order and even refuse to carry out such an order if the RN believes that the medical order is inappropriate or incorrect. While this type of judgment may indeed be characterized as "independent," it is not exercised in connection with one of the indicia of supervisory status set forth in Section 2(11) of the Act. An RN's judgment in this regard, independent or not, is not exercised in connection with the supervision of other employees, but

rather is the result of their training and responsibilities as a professional in the medical field. Accordingly, the exercise of judgment in this area does not confer supervisory status.

5. NICs' ability to file reports on other nursing staff:

The fact that NICs may file reports with stipulated supervisors regarding misconduct engaged in by other RNs, LPNs, and other personnel does not indicate that RN charge nurses discipline employees or that they effectively recommend such action. The record discloses that when such reports are made, and the record is quite vague about their frequency, the NIC engages in no more than a reportorial function as opposed to disciplining employees or effectively recommending such action. Indeed, there is no evidence, as the stipulation on this point by the parties would indicate, that the NIC plays any role in the disciplining of employees. It is well established that the mere exercise of a reporting function which does not automatically lead to further discipline or adverse action against an employee and which is reviewed by a conceded supervisor does not establish supervisory authority. See, *Wilshire at Lakewood*, 343 NLRB No. 23 at slip. op. 2-3 (2004); *Lincoln Park Nursing and Convalescent Center*, 318 NLRB 1160, 1162 (1995); *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992). Accordingly, any purported role of NICs in the disciplinary process does not support a finding that they are supervisors within the meaning of Section 2(11) of the Act.

6. NICs as highest ranking employees at the departmental level:

With respect to the Employer's argument regarding the NICs being the highest ranking employee at the departmental level on two-thirds of the shifts, this ignores the fact that admitted supervisory personnel are present at all times within the hospital and that substantially all personnel matters are handled at a higher level. Moreover, it is only during the less busy night and morning shifts that there are not higher level personnel present in the departments. In addition, as noted above, during these shifts general nursing supervisors are available at all times by intercom and intervene as needed when out of the ordinary situations arise at the department level.

7. Assignment and direction of work:

As noted above, possession of any one of the indicia of supervisory authority set forth in Section 2(11) of the Act may lead to the conclusion that an individual is a supervisor, assuming that the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. The Board, however, has often concurrently analyzed the ability to assign work and to responsibly direct employees. Thus, the Board has noted that "there are times when the assignment of tasks overlaps with direction. For example, ordering a nurse to take a patient's blood pressure could be viewed as either assigning the nurse to that procedure or directing the nurse in the performance of patient care." *Providence Hospital*, 320 NLRB 717, 727 (1996). I will, therefore, consider these two indicia of supervisory authority together.

Regarding work assignments, the record discloses that NICs may assign nursing personnel to patients or specific duties based on the nature and condition of the patient and considering the knowledge, skills, and experience possessed by each nurse. For example, a NIC in pediatrics

testified that she switched the order of nurses handling admissions to ensure that the nurse with the greatest experience and/or expertise handling a certain condition was responsible for the patient with a particular condition. In addition, a nurse when functioning as the NIC in the operating room, assigns other nurses to a particular operating room based upon the difficulty of the procedure matched to the nurse whom she feels may best assist. In regard to changing a nurse's original assignment, the record discloses that a NIC may on occasion change a nurse from one assignment to another, including sending personnel to another department, for the purpose of matching a patient's needs with a nurse's specialized skills, experience, and abilities. It does not appear, however, that this is universally the case with all NICs in all departments, (and, as noted previously, there is no indication of what occurs in the catheter department). In this regard, I note that even the most inexperienced RNs, who would have little familiarity with the skills and expertise of other RNs, rotate through NIC positions and thus could not reasonably be expected to make such a judgment call. Moreover, even per diem RNs - who apparently are not regular staff - are called upon to rotate into NIC type positions.

As noted above, the monthly, bi-weekly and daily work assignment schedules are prepared primarily by supervisors in charge of the respective departments and/or by the clinical coordinators in the respective departments. In the absence of the department supervisor and the clinical coordinator, general supervisors also prepare work assignment schedules. However, the NICs may on occasion modify these assignment schedules at the outset of and during the course of their respective shifts. Additionally, on occasion in some departments the NICs initially prepare the daily work assignment sheets themselves. A NIC may seek out other employees for coverage when it is insufficient in their department. Rather than performing this task themselves, a NIC may also request help from a general supervisor. Once notified, the general supervisor is responsible for rectifying this deficiency. The general supervisor may accomplish this by shifting nursing personnel from one department to another or by calling in per diem nurses. A general supervisor is available via intercom on all shifts and for all departments to address these types of staffing situations or any unusual or emergency situations involving patients.

From the above facts it is clear that when serving in a NIC type position, RNs do not have the exclusive authority or responsibility for daily staffing adjustments and only in isolated and sporadic situations may schedule employees or attempt to call them to work. On the other hand, in the instant case there is evidence that establishes that some of the RNs are viewed as possessing skills and abilities superior to other RNs and that in many departments NICs make assignments of employees based on such perceived skills.

The record also discloses that RNs direct LPNs and other employees in the performance of their duties. However, the type of direction varies from department to department depending on the ratio of RNs to LPNs and the type of department. The record contains some specific examples of ways in which RNs direct the work of other employees in the context of patient care. Thus, a NIC of a department may instruct an LPN to take vital signs, perform electrocardiograms, and to transfer patients to other units. LPNs may also be instructed by the RN in charge to clean and bathe patients, change their blankets, record intake and output, perform telemetry, take patients to different areas of the hospitals for studies and testing, or to perform other tasks related to direct patient care.

With regard to responsibly directing the work of employees from outside the department, the record discloses that NICs throughout the nursing department sometimes call for and prioritize certain services. Thus, NICs prioritize X-ray services and respiratory therapy services by directing those technicians to perform such tasks in a specified order within the NIC's department. NICs may also direct nursing personnel to cease or suspend performing one duty and to perform another that the NIC deems more important or time sensitive.

The Board and federal courts "typically consider assignment based on assessment of a worker's skills to require independent judgment and, therefore, to be supervisory," except where the "matching of skills to requirements [is] essentially routine." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) citing *Brusco Tug & Barge Co*., 247 F.3d 273 (D.C. Cir. 2001). This will not be the case, of course, if all of the employees overseen are viewed as having essentially the same skills. *Franklin Home Health Care*, supra; *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997). In the instant case apparently at least some NICs assign work to nursing staff based upon their perception that various nurses have differing degrees of expertise and will match a specific nurse to a specific task or patient.

D. Analysis:

While the question is a close one, if I were faced with the issue of whether only a small number of specified RNs serving in the NIC position for more extended periods of time were supervisors, I may conclude that, grounded upon their ability to make assignments to employees based an evaluation of the employees skills, at least certain RNs possess supervisory indicia when substituting as NICs. I am mindful, however, that the Employer is not asserting that only particular NIC positions are supervisory and only certain RNs supervisors because they regularly rotate through these positions, but instead the Employer maintains that its entire work force of over 200 RNs are supervisors. Moreover, whether they work in an area where the NICs have been shown to have some modicum of supervisory indicia or not, on any given day, viewed in isolation, the duties and authority of the vast majority of the employees sought to be represented would not remove them from coverage by the Act. Therefore, any authority possessed by a NIC employee is episodic and limited in duration - the RNs in issue generally possessing not even arguable supervisory authority. In a like vein, due to the apparent rotational scheme within each department, the number of times a nurse serves in a NIC position is inversely proportional to the number of employees supervised; i.e., a nurse in a large department may oversee a large number of employees but will assume this position infrequently, while a nurse in a department with the smallest number of nurses will fill the NIC position most often but have few employees to oversee and thus presumably will be called upon less often to exercise any ostensible supervisory authority.

The present situation is distinguishable from those cases where only certain employees who generally work in the unit are called upon to fill supervisory positions. [12]/ Here, if RNs' regular rotation into the NIC position is sufficient to make them all supervisors, an entire large unit

[12]/ See, e.g., *Rhode Island Hospital*, 313 NLRB 343, 349 (1993); *Aladdin Hotel*, 270 NLRB 838 (1984).

(which, again, would undeniably exist if a snapshot of the work force were taken on any given day) is rendered non-existent.

Moreover, were all of the RNs considered supervisors, counting other admitted nursing supervision, there would be a ratio of more than 2 supervisors in the nursing department for each employee (LPNs, operating room technicians and ward clerks). This is certainly an unrealistic supervisory/employee ratio. See, e.g., *Bozeman Deaconess Hospital*, 322 NLRB 1107, fn. 4 (1997); For example, in *General Dynamics Corp.*, 213 NLRB 851 (1974), the Board was faced with a situation involving certain engineering type employees who on an "intermittent, but routinely regular" basis functioned as project team leaders or in similar positions. In these positions, they selected members of their team from employees working in the various disciplines employed by their employer. In their position of project leader, they assigned tasks to employees, gave them work direction, had authority to remove them from the team and were involved in their evaluations. They could themselves, however, serve as members of other teams - apparently even while serving as a project leader on a different project. The employer involved argued, inter alia, that a large percentage of the unit was supervisory based upon these individuals on occasion serving in these positions. The Board noted as part of its finding that they were not statutory supervisors:

> Our long familiarity with the realities of working conditions has taught us that since supervisors are entrusted to assure the workability of company operations, an overabundance of supervisors would be counterproductive. Were we to credit the Employer's contentions regarding the supervisory status of the employees in issue, the ratio of supervisors to work force would be approximately two to one. [213 NLRB at 859, fn. 26]

Finally, and of greatest import with respect to my determination in this matter, this is not a case where it is argued that certain individuals are supervisors because they regularly *substitute* for a supervisor, but one where it is asserted that all employees sought to be represented – even the least experienced of RNs being mentored by other RNs – are supervisors because the Employer maintains a position through which all rotate. To agree with this argument would result in the ability of an employer to create an entire work force of supervisors with effectively no employees – an absurd and unreasonable result which is not required by the Act. [13]/ For example, in *Providence Hospital*, 320 NLRB at 730-732, RNs who served on occasion as charge nurses with essentially the same authority as the NICs in the instant case were found not to be supervisors. In *Providence*, the range of time spent by the designated RNs as charge nurses varied from an estimated 5-95 percent of the time. Although staffing schedules were prepared by higher supervision, at the beginning of a shift an RN, if acting as a charge nurse, assigned patients to employees based on the needs and acuity of the patients and the skills of the staff. Charge nurses also monitored the arrival of the other RNs to verify attendance. If an RN was absent, it was the charge nurse who was responsible for finding a replacement. With respect to the direction of work, the charge nurses were generally responsible for coordinating patient care within their areas of responsibility. Charge nurses monitored other employees' skills and performance, as well as intervened in the case of serious problems in procedures, patient care, or

[13]/ "[I]t is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp v. Cartier, Inc.*, 486 U.S. 281, 325 fn. 2 (1988).

customer relations. While apparently determining that these duties did not quite confer supervisory status, the Board nonetheless concluded its analysis of the issue by stating: "Statutory supervisory authority is not shown by the limited authority of a charge nurse team leader on one day to 'supervise' coequal RNs, some of whom may on another day 'supervise' their equals including the charge nurse." *Providence Hospital*, 320 NLRB at 733. [14]/ I believe that this view directly applies to the instant matter.

A consideration of all of the above, but especially the oft-cited admonition mentioned previously cautioning against the disenfranchisement of minor functionaries such as lead persons having minor arguable supervisory duties, the absurdness of a contrary result and the logic articulated by the Board in *Providence*, lead me to the conclusion that the unit of RNs in this matter are not supervisory with the meaning of the Section 2(11) of the Act.

E. Conclusion:

Based on the forgoing, I do not view the fact that certain employees in the unit sought may on occasion fill a minor supervisory role as establishing the Employer's claim that all RNs are supervisors within the meaning of the Act and I will direct an election among the unit of RNs sought by the Petitioner.

IV. EXCLUSIONS FROM THE UNIT

Based on the agreement of the parties and the record evidence, I find that the following persons are supervisors with the authority within the meaning of the Act: Maria Lugo, nursing director; Edwin Colon, Oswaldo Torres, Elsie Castro, and Nilda Santos, general supervisors; Edith Fernandez, Elizabeth Ambert, Dalila Velez, Benigna de Jess, Maria Ruiz, Sol Torres, Luz Rodriguez, Evelyn Martinez, Alfredo Sierra, Gabriel Ortiz, and Alziza Mamout, department supervisors; Ms. Cosme, Maria Hernandez, Marisol Rivera, Ana Rivera, Madeline Algarin, Luis Bez, Margarita Rodriguez, Adela Quiones, Alicia Quiones, and Rosa Ortiz, clinical coordinators; and Myriam Alvarado, head nurse. Accordingly, I will exclude them from the unit.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

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[14]/ See also, *General Dynamics Corporation*, supra, (relevant facts previously set forth) where in finding project managers not to be statutory supervisors the Board stated:

> In our view, true supervisorial authority is not vested in the senior engineering and administrative employees vis-a-vis the nonsenior employees in their work groups, nor is it vested in themselves as equals, who, for indeterminate periods of time, "supervise" coequals who, in turn, later "supervise" their equals while simultaneously being "supervised" by their coequals. [213 NLRB at 859]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **All registered nurses employed by the Employer at its facilities located in Ponce, Puerto Rico, excluding all other employees, managers, and all guards and supervisors as defined in the Act.**

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Unidad Laboral De Enfermeras (OS) Y Empleados De La Salud. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 24, National Labor Relations Board, La Torre de Plaza, Suite 1002, 525 F. D. Roosevelt Avenue, San Juan, Puerto Rico 00918-1002, on or before **April 7, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (787) 766-5478. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must

be received by the Board in Washington by 5 p.m., EDST on **April 14, 2005**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 31st day of March 2005.

Gary W. Muffley, Acting Regional Director [15]/
Region 24, National Labor Relations Board
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Classification Index

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177-8520-2400
177-8520-6200
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280-8060-0000

[15]/ Pursuant to OM 03-77, this matter was transferred to me pursuant to the Interregional Assistance Program for decision writing only.